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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 834

CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

JURISDICTIONAL STATEMENT

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No._____

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vs.

STATE OF MISSISSIPPI ..... Appellee

JURISDICTIONAL STATEMENT

The appellant, Catherine T. Pendergraft, appeals from a judgment of the Supreme Court of the State of Mississippi entered on July 3, 1968. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question exists.

OPINIONS DELIVERED IN THE COURT BELOW

The opinion of the Supreme Court of Mississippi is reported in 213 So. 2d 560, was entered on the 3rd day of July, 1968, and is appended as Appendix A. The judgment dated July 3, 1968, is appended hereto as Appendix B. Rehearing was denied on the 16th day of September, 1968, without a written opinion and the order denying the petition for rehearing is appended hereto in Appendix C.

This case was appealed earlier in 1966, was reversed and remanded on various grounds and is officially reported in 191 So. 2d 830.

JURISDICTION

Appellant was indicted and tried by jury in the Circuit Court of Hinds County, Mississippi, for the crime of murder, a violation of Section 2215, of the 1942 Code of Mississippi. Prior to trial, appellant filed in that Court a motion to quash the indictment and the trial venire, protesting the exclusion of females from jury service. The trial Court overruled the motions. Also prior to trial, appellant filed a motion to suppress evidence, protesting a search of her home and the seizure of certain evidence by police officers over thirteen hours prior to her arrest. The trial Court overruled that part of the motion dealing with the pre-arrest search and seizure.

On January 9, 1967, appellant was convicted and sentenced to life imprisonment.

Her motion for new trial (R. 881) and motion in arrest of judgment (R. 883) were both overruled by the trial Court on January 9, 1967, (R. 882, 884), from which appellant perfected an appeal to the Supreme Court of Mississippi (R. 887). The conviction was affirmed by the Mississippi Supreme Court on July 3, 1968, and rehearing denied September 16, 1968.

Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Mississippi on October 9, 1968.

The statutory provision for leave to confer on this Court jurisdiction of this appeal is 28 U.S.C., Section 1257, (1).

The cases sustaining jurisdiction are *White vs. Crook*, 251 Fed. Supp. 401 (1966); *Johnson vs. Zerbst*, 304 US 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Standard Oil Co. of California vs. Johnson*, 62 S. Ct. 1168, 316 U.S. 481, 86 L. Ed. 1611, (1942); *Winters vs. People of State of N.Y.*, 68 S. Ct. 665, 333 U.S. 507, 92 L. Ed. 840, (1948); *Fay vs. New York*, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043, (1947), and *Hoyt vs. Florida*, 82 S. Ct. 159, 368 U.S. 57, 7 L. Ed. 2d 118, (1961).

The judgment of the Supreme Court of the State of Mississippi constitutes a final judgment within the meaning of the above statute. *Mills vs. State of Alabama*, 86 S. Ct. 1434, 384 U.S. 214, 16 L. Ed. 2d 484 (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first question involved in this appeal is the validity of a statute of the State of Mississippi in effect at the time of appellant's trial. That statute, *Section* 1762, as amended, *Mississippi Code of* 1942, *Vol.* 2, *Recompiled*, Pages 577-578, permanent volume, Pages 159-160, Pocket Parts, is as follows:

"Section 1762. Who are competent jurors.

"Every male citizen not under the age of twenty-one years, who is a qualified elector and able to read and write, has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of

one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tales juror shall be qualified who has served as such tales juror or talesman in the last preceding two years; and no juror shall serve on any jury who has served as such for the last preceding two years; and no juror shall serve who has a case of his own pending in that Court, provided there are sufficient qualified jurors in the district, and for trial at that term."

The provision of the *Constitution of the United States* involved is *Section 1 of the Fourteenth Amendment,* which provides as follows:

"All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The second question asserted herein is the legality of a search without warrant of appellant's home over thirteen hours prior to her arrest and the seizure at that time of certain articles, later introduced during trial as evidence against her. The provision of the *Constitution of the United States* involved is the *Fourth Amendment,* which provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED

The first question presented by this appeal is whether *Section* 1762, *Mississippi Code of* 1942, Annotated, which absolutely excludes females from jury service in the State of Mississippi, on its face, and as applied and administered at the time of appellant's trial, is repugnant to and in violation of the *Fourteenth Amendment* to the *Constitution of the United States* by denying appellant the due process and equal protection of the law guaranteed by said Amendment, especially since appellant is a female person and a member of the excluded class.

The second question presented is whether appellant's constitutional rights under the *Fourth Amendment* to the *Constitution of the United States* were violated as a result of a search without warrant not incident to an arrest.

STATEMENT OF THE CASE

1. Exclusion of women as jurors

All members of the grand jury which indicted appellant were male, as were all members of the venire from which the petit jury was selected for appellant's trial. Appellant first raised the question of exclusion of women from jury service by motion to quash the indictment exhibited against her, as being returned by an all male grand jury (R. 154). Since the Mississippi Supreme Court had twice previously held, in *State Vs. Hall,* 187 So. 2d 861 (1966), and reaffirmed in *Pender-*

graft Vs. State, 191 So. 2d 830 (1966), that it was not a denial of due process or equal protection of the law to exclude women from jury service, the trial court overruled the motion to quash. (R. 155A). The point was again raised by motion to quash the jury venire, (R. 152), which was overruled (R. 156). Appellant raised the point for the third time after conviction, by filing a motion in arrest of the judgment (R. 883), which was also overruled (R. 884).

On appeal to the Mississippi State Supreme Court, the absolute exclusion of women from the grand and petit juries was again raised by assignment of error No. Nine (R. 894), which was overruled on the principle of stare decisis (see Appendix A). On petition for rehearing (R. 897), appellant again raised this question and it was again denied (Appendix C). It is from these rulings of the Mississippi Supreme Court that appellant takes this part of this appeal.

2. Search without warrant not incident to arrest.

Insofar as the question of an illegal search and seizure is concerned, appellant first raised the question of the admissibility of two butcher knives, a whiskey bottle, a drinking glass, a pillow case and pillow slip by filing a motion to suppress the evidence (R. 2). Upon hearing, the testimony of Officers Black (R 39, 40 and 60-86 & 96-113) and Magee (R. 116-125), was that, even though these officers had no search warrant, nor warrant for the arrest of Mrs. Pendergraft, still they conducted an exhaustive and extensive search of her home on the night of August 26, 1965, seizing the articles heretofore mentioned. Mrs. Pendergraft was not arrested until the following day at approximately 1:30 p.m. That part of the motion concerning the pre-arrest search and seizure was overruled (R. 150).

Upon the trial of the merits, the articles seized were introduced into evidence and appellant reiterated objection to the introduction of the articles. The point was raised again, after conviction in a motion for a new trial (R. 881), which was overruled (R. 882).

On appeal to the Mississippi Supreme Court, the question of illegal search and seizure was again raised by assignments of error No. One (R. 893) and Two (R. 893), both of which were overruled (see Appendix A). On petition for rehearing, appellant reasserted the question to that Court and was denied (Appendix C). It is from these rulings of the Mississippi Supreme Court that appellant takes this part of this appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents first the substantial question of whether *Section* 1762, *Mississippi Code of* 1942, Annotated, in absolutely excluding females from jury service, on its face, and as applied and administered in the present case, denies to appellant, as a female defendant in a criminal case, both due process and equal protection of the law guaranteed by the *Fourteenth Amendment of the Constitution of the United States.*

It was held in *Zucht Vs. King,* 260 U.S. 174, 177, 43 S. Ct. 24, 25, 67 L. Ed. 194, 198 (1922):

> "The bill contains also averments to the effect that, in administering the ordinance, the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. *Neal V. Delaware,* 103 U.S. 370, 26 L. Ed. 567."

This Court has previously held in numerous cases that a substantial Federal question is raised by a claim of

exclusion of a class from jury service. *Strauder vs. West Virginia,* 100 U.S. 303, 25 L. Ed. 664; *Hernandez vs. Texas,* 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 339; *Fay vs. New York,* supra; and *Hoyt vs. Florida,* supra.

Since females constitute approximately 52 percent of the voting age population in Mississippi, appellant's grand and petit juries lacked approximately one-half of the potentially eligible jurors. Appellant was denied a trial by a jury representative of a cross section of the community. As this Court noted in *Ballard Vs. United States,* 329 U.S. 187, 67 S. Ct. 261. 91 L. Ed. 181 (1946):

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury were truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

The Mississippi Supreme Court held, in *State Vs. Hall,* 187 So. 2d 861 (Miss. 1966), it was not a denial of due process or equal protection of the laws to exclude women from jury service. The majority opinion relied in part upon *Strauder vs. West Virginia,* supra, decided in 1879. In so doing, that Court imposed upon the women of the State of Mississippi a status in keeping with the date of the decision, limiting them to service as mothers, wives and homemakers.

However, Congress has provided that women are eligible for jury service in the Federal Courts irrespective of State law. 28 U.S.C. Paragraph 1861.

In 1964, Congress also gave specific protection to women from unfair or unlawful employment practices based on sex. 24 U.S.C. Paragraph 2000e-2.

A three-judge Federal District Court recently held that a similar jury statute of the State of Alabama completely excluding women from jury service was invalid since it denied equal protection of the law. *White vs. Crook,* 251 F. Supp. 401 (U.S.D.C. Ala. 1966). Chief Justice Ethridge of the Mississippi Supreme Court, in his dissenting opinion in *State Vs. Hall,* supra, noted the *White vs. Crook* decision, therein pointing out that a complete exclusion of one-half the population with no rational basis for classification, other than sex, is a denial to the women citizens of the State of Mississippi of their Constitutional rights. In accord are the decisions of this Court: *Thiel vs. Southern Pacific Company,* 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946); *Hernandez vs. Texas,* supra; and *Ballard vs. United States,* supra, clearly indicates that the complete exclusion of females from jury service would be violative of Constitutional rights.

A recent case which sheds light on the matter of exclusion of women from jury service is *Bass vs. State of Mississippi,* 381 F. 2d 692 (C.A.5, 1967). The Court of Appeals for the Fifth Circuit refused to remove the Bass case because 42 *U.S.C.,* Sections 1443 and 1981, provide for removal only in terms of "racial equality" and not in terms of "discrimination because of sex." The Court stated (381 F. 2d 696):

> "But Fay was heavily laden with express doubts as to the standing of the defendants, not being women, to raise the issue, a matter upon which this Court has no doubts in testing the constitutional validity of a State Court jury, Grand or Petit. *Labat Vs. Bennett,* 5th Cir., 1966, 365 F. 2d 698 (en banc) (see note 5, supra). But in the light of *Hernandez Vs. State of Texas,* 1954, 347 U.S. 475, 478, 74 S. Ct. 667, 98 L. Ed. 866, and the Court's cautious language and careful restriction to the narrowest possible issue in Hoyt, there is enough basis for an arguendo assumption that when this issue is directly presented the Supreme Court would hold that an absolute statutory exclusion—not exemption—of women as jurors is unconstitutional."

We submit that the right to be tried by a jury comprising a cross-section of the community is a federally guaranteed Constitutional right; that the complete and absolute exclusion of women from jury service, because of their sex, denied appellant due process and equal protection of the law.

The next question is whether appellant was denied her rights under the *Fourth Amendment* to the U. S. Constitution by allowing the admission into evidence of certain articles seized by police officers during a search

of appellant's home without a search warrant and not incident to an arrest of appellant.

This Court has held that a search without a warrant cannot be made unless incident to an arrest; that to be incident to the arrest, the search must be substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. *Stoner vs. State of California,* 376 US 484, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). *Stoner* cited with approval *Agnello vs. U.S.,* 269 US 20, 46 S. Ct. 4, 70 L. Ed 145 (1925), which held that a search without warrant may be made of a lawfully arrested person, or of the place where the arrest is made, in order to seize things connected with the crime if the search is contemporaneous with an arrest made lawfully during the commission of the crime.

The District Court of Ohio held in *U.S. Vs. Royster,* 204 F Supp. 760, that while a search without a warrant is reasonable when it is made incident to a lawful arrest, still in all such cases heretofore, a lawful arrest has been regarded as an *essential prerequisite* to the incidental search. Furthermore, *Royster* held, the law of search is governed by the *Fourth Amendment* as construed by the Supreme Court of the United States, and that the *Fourth Amendment* outlaws all searches made without a warrant *except* those *incident* to a *lawful arrest.*

In *Jones Vs. U.S.,* 357 U.S. 493, 78 S. Ct. 1255, 2L. Ed. 2d 1514, Federal agents entered petitioner's home at a time when petitioner, his wife, children, mother and father were all present. No arrest was made, but the agents immediately searched the home and found a whiskey still. Petitioner was arrested one hour after the search had been completed. This Court said that the search was unreasonable, since the agents entered

petitioner's home without a warrant and without arresting any of the parties present but then proceeded to make a general search for the still. Furthermore, no reason was given by the agents as to why an arrest warrant could not have been sought. The conviction was reversed.

We submit that appellant was denied a substantial Federal Constitutional right under the *Fourth Amendment* by the lower Court's allowing evidence to be used against her which was seized without warrant and was not incident to an arrest.

CONCLUSION

Whether appellant, a female defendant facing serious criminal charges, was denied due process and equal protection of the law under the constitution by the complete and absolute exclusion of women from jury service is a most important and substantial question which appellant now raises and presents to this Court.

Equally important, and equally substantial, is the question of police officers entering appellant's home, without arresting her, searching extensively and then seizing certain articles later used as evidence against her.

Both of the questions are substantial, presenting to this Court a violation of the rights granted this appellant by two separate amendments of our Constitution.

It is respectfully submitted that probable jurisdiction should be noted.

Respectfully Submitted,

MRS. CATHERINE T. PENDERGRAFT,
Appellant

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CERTIFICATE OF SERVICE

This is to certify that I, W. S. Moore, have this day personally served upon and delivered to the Honorable Joe Patterson, Attorney General of the State of Mississippi, an original and two copies of the foregoing Jurisdictional Statement.

Witness my signature this _____ day of _____, 1968.

_____

W. S. MOORE

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 44,873

MRS. CATHERINE T. PENDERGRAFT ....Appellant

V.

STATE OF MISSISSIPPI .....Appellee

ROBERTSON, Justice:

The appellant, Catherine T. Pendergraft, was convicted of the murder of her husband, Ralph N. Pendergraft, in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and was sentenced to life imprisonment in the State Penitentiary. This is the second appearance of this case before this Court, the first conviction having been reversed and the cause remanded for a new trial in an opinion reported in 191 So. 2d 830 (Miss. 1966).

On the afternoon of August 26, 1965, Pendergraft suffered seventeen stab wounds while alone with his wife, the appellant, in their home at 374 Rollingwood Drive, Jackson, Mississippi. About 7:30 that night, the appellant telephoned Grady Tucker, her former brother-in-law, and asked him and his wife, Mrs. Marie Tucker, to come to her home immediately; that something had happened to Ralph. Dr. William B. Tumlinson was called by Mrs. Marie Tucker, and arrived at the Pendergraft

home shortly after the Tuckers. Dr. Tumlinson called Dr. Thomas M. Davis, the Hinds County Coroner, and he in turn called the Jackson Police Department.

In response to this call, Detectives James L. Black and S. M. Magee were dispatched to the Pendergraft home. Ralph N. Pendergraft was found lying on his back, nude, in the family room. Rigor mortis had set in and his body was cold and stiff. Dr. Tumlinson, Dr. Davis and the two detectives examined the body and found that he had seventeen stab wounds on his body not including cuts in the webbing between his fingers and superficial cuts and scratches around the outside corners of his eyes. These wounds ranged from six puncture type wounds behind the right ear, downward to a gaping wound in his right chest, one in his right abdomen, four recent cuts just above his right knee, and numerous other cuts in the palms of his hands, the webbing between the fingers and on the outside of the fingers. All of these appeared to be shallow cuts except the ones in his chest and abdomen. His body had been completely cleaned, and there was no evidence of blood except on the sole of his right foot, on the bottom of the left big toe and around the cuticles of his fingernails. Even the fingernails themselves had been cleaned.

The detectives found a bloodstain on the doorknob of a louvered door opening from the family room to an enclosed bar. On the counter of the bar they found a partially filled bottle of scotch whiskey and a whiskey glass, both of which had bloodstains on them. The kitchen adjoins the family room, and on one counter of the kitchen the detectives found a butcher knife with bloodstains on the stainless steel blade, and on another counter near the sink they found a butcher knife that had been washed and was still wet. They found a pillowship

with a bloodstain on it on a bed in a small bedroom connected with the breakfast room. When the body was turned over, a bandaid was found underneath the body. All of these items, together with the pink bedspread which partially covered the body, were received as exhibits. All of these items were recovered on the night of August 26, while the detectives were investigating the killing and before the appellant was formally arrested on August 27.

The clothes drier was running when Grady Tucker arrived, and at the request of appellant, he turned the clothes drier off by unplugging it. In the course of their investigation, the detectives discovered that the clothes drier was very warm and had items of clothing and towels therein.

The next day, August 27, Detective Black swore out an affidavit before Judge James L. Spencer, explained to him what the case was all about and what the detectives had discovered, whereupon Judge Spencer, a lawyer, whose official position was that of Municipal Judge and Ex-Officio Justice of the Peace, issued a search warrant and the detectives returned to the Pendergraft home and picked up all items in the clothes drier. The trial judge ruled that the affidavit and search warrant were faulty and refused to allow the contents of the drier to be introduced in evidence.

An autopsy was performed on the body of Pendergraft on August 27 by Dr. William P. Featherston, with Dr. Tommy Davis, the coroner, in attendance. As a result of the autopsy, the cause of death was established as the cutting of the internal mammary artery by the stab wound in the chest. The testimony of Doctors Featherston and Davis was that Pendergraft bled to

death, and that he would have died in about an hour after the infliction of the wound.

The appellant contends that the trial court committed ten errors, as follows:

"1. The Court erred in allowing certain objects, seized on the night of August 26, 1965, as a result of an unlawful search without a search warrant and prior to the arrest of the Appellant, to be introduced in evidence.

"2. The Court erred in admitting into evidence certain objects taken by Detectives Black and Magee in the course of a search on August 26, 1965, which articles were not in the immediate surroundings or immediate vicinity of the body of Ralph T. Pendergraft.

"3. The Court erred in allowing the witness, Featherston, to testify as to the results of an autopsy when the statutory requirements had not been followed.

"4. The Trial Court erred in allowing the witnesses, Marie Tucker and George Gibson, to testify, over the objection of the Appellant, to prior difficulties and the details of said prior difficulties between the Defendant and the Deceased, Ralph Pendergraft.

"5. The Court erred in admitting into evidence the unprobated Will of Ralph Pendergraft, dated July 9, 1965.

"6. The Court erred in admitting into evidence one of the knives, Exhibit 15, found in the kitchen, which did not contain bloodstains, for the reason that the State did not prove there was any connection between

this knife and the sharp instrument which caused the death of Pendergraft.

"7. The Trial Court erred in allowing the witness, George Gibson, to testify in rebuttal, in an attempt to impeach the testimony of the Appellant, when she denied slapping the Deceased in the mouth some thirty days prior to his death.

"8. The Court erred in refusing to grant Instruction No. 15 and direct the jury to render a verdict of acquittal of the Appellant.

"9. The Trial Court erred in overruling Appellant's motion to quash the indictment and the motion to quash the venire, because of the total exclusion of women from serving as grand or petit jurors, by virtue of the laws of the State of Mississippi, in violation of the constitutional rights of the Appellant.

"10. The Trial Court committeed reversible error in threatening one of the attorneys for the Defendant with a fine for contempt of Court in the presence of the jury, which actions, on the part of the Court, could have influenced the jury to become hostile to the attorneys representing the Appellant, and, further, hampered attorneys for the Appellant in the defense of a capital crime."

With reference to the objects seized on the night of August 26, 1965, without a search warrant and prior to the arrest of the appellant, we said on the first appearance of this case before us:

"The appellant contends the officers were without probable cause to arrest her and being without search warrant the search was illegal and the fruits thereof were not admissible in evidence. We are of the opinion

that the question of 'probable cause' at the time of the initial search of the defendant's home is one for judicial determination.

"The officers were lawfully upon the premises in response to a police directive." 191 So.2d at 837.

"The greater question is whether they had the right in the course of their investigation to open the cabinet in the family room and to open the drying machine without search warrant and without arrest. We are of the opinion that this question must be resolved by a judicial determination of whether there was probable cause for the arrest of the appellant contemporaneous with the search." 191 So.2d at 838.

The trial court on the second trial, after outlining the facts in its opinion, found:

"[T]hat the officers had probable cause to believe that a felony had been committed and reasonable grounds to believe that the defendant committed the felony."

We think that the trial judge was entirely correct in his findings. These detectives would have been derelict in their duty if they had not been alert and observant in investigating a death which bore every indication of having been violently inflicted by the only other person present, namely, Mrs. Catherine Pendergraft; they would have been derelict in their duty if they had not followed up every lead they ran across.

There were several telephone conversations between Dr. Tumlinson and the district attorney, between Dr. Davis and the district attorney, and between Detective Black and the district attorney. Dr. Tumlinson testified that he tried to get Mrs. Pendergraft a hospital room

that very night but was not able to do so. The doctors, the detectives and other witnesses testified that appellant talked with a thick tongue and appeared to be under the influence of alcohol or drugs; that she was in a precarious mental, physical and emotional condition. It follows quite logically that the only reason the appellant was not arrested that very night was because all parties were concerned about her doubtful condition; there certainly was probable cause to suspect her. The appellant was alone with her husband in their home when he was fatally wounded and when he was stabbed seventeen times. She never denied that she had done the stabbing; she said that he attacked her and she acted in self-defense.

The items were found and taken from the immediate vicinity of the body or from the rooms adjoining the family room where the body itself was found. These articles were properly admitted into evidence.

The appellant contends that Dr. Featherston should not have been allowed to testify as to the results of an autopsy performed by him when the statutory requirements had not been followed. The thrust of the argument made by the appellant on this assignment of error seems to be that if a copy of the report of the autopsy had been filed with the circuit clerk it would have been available to the accused. The district attorney stated into the record that he personally had promptly furnished a copy to counsel for accused in the first trial and that even though other attorneys represented appellant on the second trial, he had furnished an additional copy to new counsel. The trial judge was correct in construing Sections 7158-04 and 05, Mississippi Code of 1942 Annotated (Supp. 1966) as applying only to the admissibility of the autopsy report in civil cases. It was

not the legislative intent and purpose for an accused in a criminal case to have the standing or the right to complain that all technicalities had not been strictly followed in the ordering of an autopsy. The principal purpose of the statute is set forth in Section 7158-02, Mississippi Code of 1942 Annotated (Supp. 1966) in these words:

> "An autopsy may be performed, as provided by this act for the purpose of determining the primary and/or contributing cause of death in the interest of public health and in criminal cases."

It would be passing strange if an accused could thwart the main purpose of the statute because of a technicality.

A Kentucky case holds that a corpse is not a possession and that physicians attending the autopsy could give their opinions as to the cause of death even though an inquest might have been illegally held. This was the holding of the court in a civil case. *See* Streipe v. Hubbuch Bros. & Wellendorf, 233 Ky. 194, 25 S.W. 2d 358 (1930).

The appellant next contends that the court erred in allowing the witnesses, Marie Tucker and George Gibson, to testify of prior difficulties and the details of such prior difficulties between the appellant and her husband, and that the court also was in error in allowing the witness George Gibson to testify in rebuttal in an attempt to impeach the testimony of the appellant about the slapping incident.

These prior difficulties occurred within thirty days of the death of the deceased. Even the cases cited by the appellant, namely, *Floyd v. State,* 166 Miss. 15, 148 So. 226 (1933); *Raines v. State,* 81 Miss. 489, 33 So. 19 (1902); and *Herman v. State,* 75 Miss. 340, 22 So. 873

(1898), hold that evidence of prior difficulties occurring close to the date of the commission of the crime is admissible to show motive and intent.

Appellant was charged with the crime of murder and malice aforethought is the single most important element of this offense. Section 2215, Miss. Code of 1942 Ann. (1956). The trial judge did not err in admitting this testimony.

The appellant contends, in her fifth assignment of error, that the trial court erred in admitting into evidence the unprobated will of Ralph N. Pendergraft, dated July 9, 1965. We held in the first appearance of this case before us that this will was properly admitted into evidence. 191 So.2d 830, 837 (Miss. 1966). This will was filed for probate in the office of the Hinds County Chancery Clerk in Jackson, Mississippi, on August 31, 1965. The only reason it was not admitted to probate is because a caveat was filed by the two adult daughters of Ralph Pendergraft by his first marriage. The appellant desired very much for this will to be admitted to probate because its provisions were very liberal and favorable to her; she did not object in any way to its probate.

Counsel for the appellant were very careful to offer into evidence the Decree of December 3, 1965, approving the Family Settlement Agreement which was attached to and made a part of the Decree. Now there was also attached to the Family Settlement Agreement, made a part thereof, and, therefore, constituting a part of the Decree, a copy of this very Last Will and Testament dated July 9, 1965. Counsel for the appellant are, therefore, in the very inconsistent position of having offered into evidence and having persuaded the trial

court to accept in evidence the very will that they now object to. We very quickly find that the will of July 9, 1965, was properly admitted into evidence on the application of both the State and the appellant.

The trial court did not err in admitting into evidence the butcher knife with the stainless steel blade found on a rack above the sink in the kitchen which adjoined the family room. This knife had been washed, still had water spots on it and was located in the room adjoining the room where Pendergraft lay dead from a fatal stab wound.

The appellant contends next that the trial court erred in refusing to grant her a premptory instruction based on what has come to be known as the *Yeathersby* rule. That rule is that, where the charge of murder is based solely on circumstantial evidence, if the defendant's version is reasonable and believable, her testimony must be accepted unless the circumstances and facts contradict defendant's testimony in materal particulars. Weathersby v. State, 165 Miss. 207, 147 So. 481 (1933).

It was never denied that appellant inflicted the stab wounds on the deceased. In her sworn testimony she gave three different versions as to what happened on that fateful afternoon, and all three are couched in vague and indefinite language. The record is replete with facts which contradict all of the appellant's versions of how the killing happened. The only defense that she attempted to prove was self-defense. Yet the testimony and physical facts refute that defense at every turn. She had no cuts or scratches on her body, yet she testified that an angry two hundred pound man advanced on her with a butcher knife. She, being deathly afraid

of him because he was so strong and she so weak, in some way took the knife away from him without so much as a scratch, and stabbed him seventeen times, not counting the cuts on his hands. Her testimony simply does not hold water as to how the killing happened. The jury was justified in not believing such improbable, illogical and incomprehensible testimony. Under no stretch of the imagination was she entitled to a peremptory instruction.

The contention that the trial court erred in overruling appellant's motion to quash the indictment and the venire because of the total exclusion of women from the grand jury indicting and the petit jury trying the appellant, was specifically ruled on adversely to the appellant in our first opinion. 191 So.2d 830, 839 (Miss. 1966). We said that this question had been disposed of in the case of *State v. Hall,* 187 So.2d 861 (Miss. 1966). In *Hall* we said that the power to prescribe the qualifications for jurors is in the legislature and it has the power to make reasonable classifications. The 1968 Mississippi Legislature, we note, has exercised its prerogative and has recently enacted a law permitting women to serve on grand and petit juries. In Mississippi the legislature still enacts the laws, and the courts merely interpret them.

The tenth and last assignment of error is that "The Trial Court committed reversible error in threatening one of the attorneys for the defendant with a fine for contempt of the Court in the presence of the jury. . . ."

The trial judge has the duty and responsibility of enforcing proper decorum in the courtroom. His remark was addressed impartially to the prosecution and the defense when he said:

"Now, let me say this to both of you. If either of you makes another remark, it will be fifty dollars. You understand that, both of you?"

No objection was interposed by counsel for appellant to this remark of the Court at the time that it was made. If counsel for the appellant did not see fit to object to it at the trial, they cannot be heard to object on appeal.

The judgment is affirmed.

AFFIRMED.

GILLESPIE, P.J., AND JONES, BRADY AND PATTERSON, JJ., CONCUR.

Appendix B

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Wednesday, July 3, 1968, Court Sitting

No. 44,873

MRS. CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 9th day of January 1967—a conviction of murder and a sentence to serve a Term on LIFE in the State Penitentiary—be and the same is hereby affirmed. It is further ordered and adjudged that the appellee do have and recover of and from the appellant and James B. Tucker and James D. Harris, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

MINUTE BOOK "BO" Page 369

STATE OF MISSISSIPPI
HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the above is a true and correct copy of the judgment as it appears on file in Minute Book "BO" Page 369 in this office.

Given under my hand, with the seal of said Court Court affixed, at office, in the City of Jackson, Miss., this the 8th day of October A.D., 1968.

Clerk Supreme Court

Appendix C

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Monday, September 16, 1968, Court Sitting

No. 44,873

MRS. CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

This cause this day came on to be heard on the Petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said Petition be and the same is hereby denied.

MINUTE BOOK "BO" Page 382

STATE OF MISSISSIPPI
HINDS COUNTY

I, Julia H. Kendrick, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the above is a true and correct copy of the judgment as it appears on file in Minute Book "BO" Page 382 in this office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 8th day of October A. D., 1968.

Clerk Supreme Court

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NO. 834

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

JOE T. PATTERSON, *Attorney General*

BY: G. GARLAND LYELL, JR.
Assistant Attorney General
P. O. Box 220
Jackson, Mississippi 39205
Counsel for Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 834

CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellee in the above styled and numbered cause moves to Dismiss or Affirm on the ground that the questions presented are so unsubstantial as not to need further argument. The Opinion of the Mississippi Supreme Court is not set out herein since it is made an Appendix to appellant's jurisdictional statement.

QUESTIONS PRESENTED

I.

DID THE MISSISSIPPI STATUTE CONFINING JURY SERVICE TO MALES AT THE TIME OF APPELLANT'S TRIAL VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II.

APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY ADMISSION INTO

EVIDENCE OF CERTAIN ARTICLES SEIZED BY TWO DETECTIVES DURING A CURSORY SEARCH OF HER HOME WITHOUT A WARRANT?

ARGUMENT

DID THE MISSISSIPPI STATUTE CONFINING JURY SERVICE TO MALES AT THE TIME OF APPELLANT'S TRIAL VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

This question has been repeatedly before this Court and decided adversely to appellant since *Strauder v. West Virginia,* 100 U.S. 303, was decided in 1880 and because of the long standing doctrine and its acceptance for such a long period of time this Court refused to even discuss the question further in *Hoyt v. Florida,* 368 U.S. 57. This same question was raised as late as 1968 in an appeal to this Court in *Abraham Reed v. Mississippi,* 390 U.S. 413, wherein by a per curiam opinion this Court dismissed the appeal for want of jurisdiction. The same result was reached in *State v. Virginia Hall,* 187 So. 2d 861 (Miss., 1966), when her appeal was dismissed by this Court. *Virginia Hall v. Mississippi,* 385 U.S. 98 (1966).

APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY ADMISSION INTO EVIDENCE OF CERTAIN ARTICLES SEIZED BY TWO DETECTIVES DURING A CURSORY SEARCH OF HER HOME WITHOUT A WARRANT?

Appellant and her husband were alone in their home. She called the brother of her former husband and when he appeared at appellant's home and found the naked

dead body of Mr. Pendergraft lying on the floor with multiple cuts and stab wounds about his body, he called Mrs. Pendergraft's doctor. The doctor then called the county coroner who, in this case, was a medical doctor. It was the coroner who notified the police and two detectives were dispatched to the Pendergraft home. When they arrived they saw the body lying on the floor and saw that Mrs. Pendergraft was, as the Mississippi Supreme Court stated in its Opinion, talking "with a thick tongue and appeared to be under the influence of alcohol or drugs, that she was in a precarious mental, physical and emotional condition."

Appellant would make capital of the fact that the items of evidence complained of were found and seized by the detectives before appellant was actually arrested. It is respectfully submitted that the action of the officers in the case at bar is like that of the officers in *Harried v. United States,* 389 F. 2d 281 (1967), wherein the Court of Appeals for the District of Columbia said:

> "They are quite consistent with permissible, indeed commendable, alert observations in the course of an investigation into a murder."

The testimony in this case shows that there were telephone calls by the detectives to the district attorney and that as a result of these calls she was not arrested at that time. An effort was made to get her in a hospital but no room could be found and she was allowed to remain at home overnight with a relative and was not arrested until the next day after she had been charged with murder and a warrant for her arrest issued. As the Mississippi Supreme Court said, there was certainly probable cause to suspect her and "It follows quite logically that the only reason that the appellant was not arrested that very night was because all parties

were concerned about her doubtful condition;". Certainly such humanitarian actions on the part of the two detectives and the district attorney would not invalidate this search merely because appellant had not been formally arrested. Cf. *Warden, Maryland Penitentiary, v. Hayden,* 387 U.S. 294 (1967).

Furthermore, even if the limited search on the night of the homicide by the two detectives is not approved by this Court, the articles found as a result of this limited search were so inconsequential in view of the overwhelming evidence of appellant's guilt that beyond any shadow of a doubt any error in the admission of those articles is harmless error under the rule of *Chapman v. California,* 386 U.S. 18, reh. den., 386 U.S. 987 (1967).

CONCLUSION

For the foregoing reasons this appeal should be dismissed or the judgment of the Mississippi Supreme Court should be affirmed since there has been presented by this appeal no substantial federal questions which are deserving of the consideration of the United States Supreme Court.

Respectfully submitted,

JOE T. PATTERSON, *Attorney General*

By

G. GARLAND LYELL, JR.
Assistant Attorney General
P. O. Box 220
Jackson, Mississippi 39205
Counsel for Appellee

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, five copies of the foregoing Motion to Dismiss or Affirm to Messrs. W. S. Moore and W. D. Kendall, 200 Petroleum Building, Jackson, Mississippi 39201; Honorable W. E. Gore, Jr., 500 First Federal Building, Jackson, Mississippi 39201 and Honorable James B. Tucker, 118 South President Street, Jackson, Mississippi 39205.

This the_____day of March, A. D., 1969.

_____

Assistant Attorney General

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MAY 14 1969
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 834

CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 834

CATHERINE T. PENDERGRAFT ..... Appellant

vs.

STATE OF MISSISSIPPI ..... Appellee

PETITION FOR REHEARING

The Appellant, Mrs. Catherine T. Pendergraft, respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause, and in support of this petition, represents to the Court as follows:

1. That this Court on the 21st day of April, 1969, declined to note probable jurisdiction on the point raised by appeal and declined to grant certiorari on the point raised, Justice Douglas dissenting.

2. That the question raised in Appellant's Jurisdictional Statement, as to the statutory exclusion of women from her grand and petit jury panels, presented to this Court for the first time whether a woman, after both indictment and conviction by the all-male jury panel, had been deprived of due process and equal protection of the laws by the complete statutory exclusion of females from jury service.

3. That to Appellant's knowledge, the only other time this question had been presented to this Court by a woman was in *Hall v. State of Mississippi,* certiorari denied, 385 U.S. 98 (1966), but the distinction of that,

case being that Mrs. Virginia Hall had not been convicted, nor even tried, at the time this Court considered her question, since the nisi prius court, Lee County, Mississippi, had sustained a motion to quash her indictment.

4. That Appellant first raised this question in 1966, at which time three states, Mississippi, Alabama and South Carolina, arbitrarily excluded women, by statute, from jury service; that, since that time and subsequent to Appellant's trial in January, 1967, all three of these states have now amended their statutes to permit members of the female sex to serve on juries; that these changes obviously indicate that there existed a serious and substantial constitutional question as to the arbitrary exclusion of women, as a class, from jury service; that this Appellant, as a female, should not now be penalized nor deprived of the right to have this Court consider the constitutionality of the statutory exclusion of females, as a class, from the panels of both the Grand and Petit juries which considered her case solely because the State of Mississippi has remedied the defective situation, and if such be the case Appellant humbly and respectfully asks that this Court so state by written opinion.

5. That this Court granted certiorari in *Cardinale v. Louisiana*, No. 76, on the October 1968 docket of this Court, which is still pending, wherein the question was raised whether Cardinale was denied due process by the admission of evidence of other crimes in his confession; that, over the objection of this Appellant, evidence of prior crimes and difficulties were introduced during her trial through the State's witness, Marie Tucker; that this was error constituting a substantial Federal question which Appellant now raises, although not previously presented to this Court in the jurisdictional statement.

CONCLUSION

That this Court should grant a rehearing in this cause, note probable jurisdiction on Point One, grant certiorari on Point Two and reverse and remand for proper indictment by a grand jury composed of members of the female sex.

Respectfully Submitted,

MRS. CATHERINE T. PENDERGRAFT

BY: .....

CERTIFICATE

I, W. S. Moore, of counsel for Appellant, do certify that the foregoing petition is presented in good faith; not for the purpose of delay and that said petition insofar as it relates to certiorari is restricted to the grounds specified that are substantial although not previously presented.

W. S. MOORE

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

PENDERGRAFT *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 834. Decided April 21, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.